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TAN CHONG INDUSTRIAL EQUIPMENT SDN BHD v. TRANSNASIONAL EXPRESS SDN BHD & ORS

COURT OF APPEAL, PUTRAJAYA
SUPANG LIAN JCA
HASHIM HAMZAH JCA
B LIM CHONG FONG JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-1405-07-2021]
26 AUGUST 2024

C **Abstract** – *Parties to a contract are bound by the terms of the agreement that they had agreed to and when any contractual dispute arises and is brought to court, the court has a duty to defend, protect and uphold the sanctity of the contract unless such contract is vitiated by any circumstances recognised by the law. When the parties to a contract has explicitly agreed to their respective obligations under the contract, the* D *issue of restitution or unjust enrichment pertaining to those explicit terms does not arise. The contract must be invalidated under any legal grounds before the aggrieved party may claim unjust enrichment or the right to restitution.*

E ***CONTRACT:*** *Unjust enrichment – Restitution – Default in monthly payments under lease and maintenance agreements – Parties negotiated and entered into settlement agreement ('SA') and sale and purchase agreement ('SPA') to resolve outstanding payment in full and final settlement made up of transfer of land and payment of balance in instalments – Default in instalment payments under SA –* F *Allegation by defaulting party that land transferred at value in excess of debt owed and there was overpayment – Claim for restitution premised on unjust enrichment – Whether defaulting party acknowledged validity of SA and SPA and agreed to purchase price of land – Whether SA and SPA challenged or set aside – Whether defaulting party could seek restitution for unjust enrichment – Whether election to* G *treat SA and SPA as valid and binding constituted complete bar to claim for restitution on ground of unjust enrichment – Contracts Act 1950, ss. 71 & 73*

CONTRACT: *Coercion – Restitution – Default in monthly payments under lease and maintenance agreements – Parties negotiated and entered into settlement agreement ('SA') and sale and purchase agreement ('SPA') to resolve outstanding* H *payment in full and final settlement made up of transfer of land and payment of balance in instalments – Default in instalment payments under SA – Allegation by defaulting party that land transferred at value in excess of debt owed and there was overpayment – Claim for restitution premised on coercion – Whether there was coercion – Whether there was criminal intimidation – Whether SA and SPA* I *entered by parties on own volition and free will – Contracts Act 1950, ss. 14, 15, 19(1), 71 & 73*

The first to fifth respondents were the operators of express bus companies, which were subsidiaries of the sixth respondent. The appellant, the owner of the buses, had entered into a series of lease and maintenance agreements with the first to fifth respondents, respectively, for the use and maintenance of those buses. The seventh respondent, on the other hand, was the owner of a piece of land. The first to fifth respondents had defaulted in their monthly payments under the lease and maintenance agreements, incurring a debt totalling RM32,920,575.06. As a result, the appellant terminated the lease and maintenance agreements and repossessed its 49 buses from the respondents. After a series of negotiations, the first to sixth respondents and the appellant entered into a settlement agreement ('SA') to resolve the outstanding payment in a full and final settlement made up of the transfer of the land to the appellant and the payment of the balance of RM16,920,575.06 in eight instalments. The transfer of the land was affected by way of a sale and purchase agreement ('SPA') made between the appellant and the seventh respondent. In the SA and the SPA, the agreed purchase price of the land was RM16 million. The first to sixth respondents, save for one instalment, defaulted in paying the instalment payments. In consequence, the appellant terminated the SA and repossessed the leased buses except for one held by the Customs Department. The respondents filed a suit, at the High Court, against the appellant premised upon restitution based on unjust enrichment and coercion under the common law, as well as ss. 71 and 73 of the Contracts Act 1950 ('CA'). The respondents submitted that: (i) they had transferred the land to the appellant at a value in excess of the debt owed by the first to sixth respondents; and (ii) there was an overpayment to the appellant, in the amount of RM22,679,424.94, due to coercion and unjust enrichment. The High Court allowed the respondents' claim. Hence, the present appeal by the appellant. The issues that arose for adjudication were whether the trial judge erred: (i) on the threshold issue of the maintainability of the respondents' claim for unjust enrichment and restitution when the respondents elected not to challenge nor set aside the SPA, including the agreed purchase price of RM16 million for the said land; and (ii) in holding that the claims for unjust enrichment and coercion had been established and consequently ordered for restitution.

Held (allowing appeal)
Per Hashim Hamzah JCA delivering the judgment of the court:

(1) The respondents (i) acknowledged the validity of both the SA and the SPA, including the agreed purchase price of the said land at RM16 million; (ii) did not seek to challenge or set aside the SA and the SPA in their claim against the appellant. In the absence of so doing, the respondents could not seek restitution for unjust enrichment. The respondents were, therefore, bound by their contractual bargain under

the SA and the SPA, especially on the agreed purchase price of the land; (iii) could not now claim that the appellant had been unjustly enriched through the arrangements that the respondents themselves had agreed to, as this would be equivalent to allowing the respondents to override, subvert or defeat the terms of the SA and the SPA. The respondents' election to treat both the SA and the SPA as valid and binding constituted a complete bar to the respondents' claim for restitution on the grounds of unjust enrichment, for the following reasons: (i) a party is, in law, bound and could not resile from the terms of the agreement. When any contractual dispute is brought before the court, the court has a solemn duty to defend, protect and uphold the sanctity of the contract entered into between the parties, except if the contract is vitiated by any circumstances recognised by the law, such as fraud, coercion or undue influence. These are some of the factors that could invalidate a contract and render it unenforceable; (ii) a court should not rewrite the terms of the contract between the parties, even if the court deems it to be fair or equitable; and (iii) if the parties to a contract had explicitly agreed to their respective obligations under the contract, then the issue of restitution or unjust enrichment pertaining to those explicit terms does not arise. Their obligations are fulfilled based on the terms of the contract that they had agreed upon. The contract must be invalidated under any legal grounds before the aggrieved party can claim unjust enrichment or the right to restitution. (paras 16-22 & 35)

(2) The nature of the respondent's claim was that they had agreed to the purchase price of the said land in the SA and the SPA, through the appellant's alleged coercion, even though the value of the said land was higher. In order for the respondents to be successful in their claim, the elements of s. 15 of the CA must be fulfilled. This, the respondents failed to do. The respondents had instead brought their claim against the appellant under s. 73 of the CA for coercion and restitution. Based on the nature of the respondents' claim against the appellant, there was a misdirection on the part of the trial judge when Her Ladyship found that the respondents had successfully proven coercion on the part of the appellant with reference to s. 73 of the CA. The respondents failed to adduce compelling evidence that the SA and the SPA were made under coercion, as pleaded by them and defined in s. 15 of the CA. The respondents were disentitled to rely on s. 73 of the CA. Further, the evidence adduced disclosed that the SA and the SPA were indeed entered by the parties on their own free will, without criminal intimidation. (paras 42-43 & 50-52)

Case(s) referred to:

Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor And Other Appeals [2009] 6 CLJ 22 CA ***(refd)***

Chin Nam Bee Development Sdn Bhd v. Tai Kim Choo & Ors [1988] 1 CLJ 319; [1988] 1 CLJ (Rep) 457 HC ***(refd)***

Dimskal Shipping Co SA v. International Transport Workers Federation [1992] AC 152 ***(refd)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***

Kanhaya Lai v. National Bank Of India Ltd [1913] ILR Vol XL 598 ***(refd)***

Kosbina Konsult (K) Sdn Bhd (In Liquidation) v. Madu Jaya Development Sdn Bhd [2019] 6 CLJ 301 CA ***(refd)***

Lee Fu Sdn Bhd v. Unique Progress Sdn Bhd [2003] 4 CLJ 171 HC ***(refd)***

Pembinaan SPK Sdn Bhd v. Jalinan Waja Sdn Bhd [2016] 10 CLJ 112 CA ***(refd)***

Robert Taylor v. Motability Finance Limited [2004] EWHC 2619 (Comm) ***(refd)***

Shell Malaysia Trading Sdn Bhd v. Lim Yee Teck & Ors [1982] CLJU 11; [1982] 1 LNS 11 FC ***(refd)***

Teck Guan Trading Sdn Bhd v. Hydrotek Engineering (S) Sdn Bhd & Ors [1996] 1 BLJ 163 HC ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 10(1), 14, 15, 19(1), 71, 73

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[Editor's note: For the High Court judgment, please see Transnasional Express Sdn Bhd & Ors v. Tan Chong Industrial Equipment Sdn Bhd [2021] 10 CLJ 314 (overruled).]

Reported by Najib Tamby

JUDGMENT

Hashim Hamzah JCA:

Introduction

[1] This is an appeal by the appellant against the High Court's decision dated 15 July 2021 that entered judgment in favour of the respondents premised primarily on unjust enrichment.

Background Facts

[2] Briefly, the background facts leading to this appeal are as follows.

[3] The first to the fifth respondents were the operators of express bus companies, which were subsidiaries of the sixth respondent. The appellant was the owner of the buses and had entered into a series of lease and maintenance agreements with the first to the fifth respondents, respectively, with respect to the use and maintenance of those buses.

[4] The seventh respondent was the owner of a piece of land held under HS(D) 87546, PT No. 7929, Bandar Ampang, Daerah Ulu Langat, Negeri Selangor (hereinafter referred to as "the said land").

[5] The first to the fifth respondents had defaulted in their monthly payments under the lease and maintenance agreements, incurring a debt totalling RM32,920,575.06. As a result, the appellant terminated the lease and maintenance agreements on 21 April 2016 and repossessed its 49 buses from the respondents.

[6] After a series of negotiations, on 4 July 2016, the first to the sixth respondents and the appellant entered into a settlement agreement (hereinafter referred to as "the SA") to resolve the outstanding payment in a full and final settlement made up of the transfer of the said land to the appellant and payment of the balance of RM16,920,575.06 in eight instalments.

[7] The transfer of the said land was affected by way of a sale and purchase agreement made between the appellant and the seventh respondent dated the same day (hereinafter referred to as "the SPA").

[8] In the SA and the SPA, the agreed purchase price of the said land was RM16 million.

[9] Subsequently, the first to the sixth respondents, save for one instalment, had defaulted in paying the rest of the other instalment payments. In consequence, the appellant terminated the SA and repossessed the leased buses except for one held by the Customs Department.

[10] The respondents filed a suit at the High Court against the appellant premised upon restitution based on unjust enrichment and coercion under the common law as well as ss. 71 and 73 of the Contracts Act 1950 (hereinafter referred to as "the Contracts Act").

[11] The respondents claimed that they had transferred the said land to the appellant at a value in excess of the debt owed by the first to sixth respondents. The respondents claimed that there was an overpayment to the appellant of RM22,679,424.94 due to coercion and unjust enrichment. The respondents ultimately sought for its restitution thereof.

[12] The matter went to full trial. At the conclusion of the trial, the learned trial judge had allowed the respondents' claim. Dissatisfied, the appellant filed this appeal.

Issues

[13] We are of the view that there are two core issues in this appeal, namely:

(i) whether the learned trial judge had erred on the threshold issue of the maintainability of the respondents' claim for unjust enrichment and restitution when the respondents elected not to challenge nor set aside the SPA, including the agreed purchase price of RM16 million for the said land; and

(ii) whether the learned trial judge erred in holding that the claims for unjust enrichment and coercion had been established and consequently ordered for restitution.

Our Findings

[14] After a comprehensive review of the appeal records and hearing all parties to this appeal, we have arrived at an unanimous decision as follows.

First Issue: Maintainability Of The Respondents' Claim

[15] Before us, the core issue, which we recognise as of significant importance, is whether the respondents may claim against the appellant for restitution based on unjust enrichment and coercion without invalidating or setting aside the SA and the SPA.

[16] In this case, it is important to note that the respondents have acknowledged the validity of both the SA and the SPA, including the agreed purchase price of the said land at RM16 million.

[17] However, in their case against the appellant, the respondents did not seek to challenge or set aside the SA and the SPA. The respondents were claiming the restitution of RM22.7 million being the alleged overpayment to the appellant, *ie*, the valued price of the said land at RM55.6 million less RM32.9 million debt owed to the appellant.

[18] According to learned counsel for the appellant, the respondents' election to treat both the SA and the SPA as valid and binding constituted a complete bar to the respondents' claim for restitution on the grounds of unjust enrichment. We agree with learned counsel for the appellant based on the following reasons.

[19] Firstly, a party is, in law, bound and cannot resile from the terms of the agreement. When any contractual dispute is brought before the court, the court has a solemn duty to defend, protect and uphold the sanctity of the contract entered into between the parties, except if the contract is vitiated by any vitiating circumstances recognised by the law, such as fraud, coercion, or undue influence. These are some of the factors that can invalidate a contract and render it unenforceable.

[20] In the case of *Bank Islam Malaysia Bhd v. Lim Kok Hoe & Anor And Other Appeals* [2009] 6 CLJ 22; [2009] 6 MLJ 839, Raus Sharif JCA (as he then was) speaking for this court held as follows:

> Similarly, the law applicable to BBA contracts is no different from the law applicable to a loan given under the conventional banking. The law is the law of contract and the same principle should be applied in deciding these cases. *Thus, if the contract is not vitiated by any vitiating factor recognised law such as fraud, coercion, undue influence, etc the court has a duty to defend, protect and uphold the sanctity of the contract entered into between the parties.*
>
> (emphasis added)

[21] Secondly, it is trite that the court should not rewrite the terms of the contract between the parties, even if the court deems it to be fair or equitable (see *Shell Malaysia Trading Sdn Bhd v. Lim Yee Teck & Ors* [1982] CLJU 11; [1982] 1 LNS 11; [1982] 2 MLJ 181).

[22] Now, let us delve into the third and most crucial point. If the parties to a contract have explicitly agreed to their respective obligations under the contract, then the issue of restitution or unjust enrichment pertaining to those explicit terms does not arise. Their obligations are fulfilled based on the terms of the contract that they have agreed upon. In our view, the contract must be invalidated under any legal grounds before the aggrieved party can claim unjust enrichment or the right to restitution.

[23] We are in full agreement with the House of Lords in *Dimskal Shipping Co SA v. International Transport Workers Federation* [1992] AC 152, where the following is stated:

> *... It follows that, before the owners could establish any right to recover the money, they had first to avoid the relevant contract. Until this was done, the money in question was paid under a binding contract and so was irrecoverable in restitution. But once the contract was avoided, the money paid under it was recoverable in restitution, on the ground either of duress or possibly failure of consideration.*
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> (emphasis added)

[24] See also *Robert Taylor v. Motability Finance Limited* [2004] EWHC 2619 (Comm); [2004] All ER (D) 341 (Nov).

[25] The Federal Court, in the landmark case of *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; [2015] 2 MLJ 441, has provided a thorough understanding of the principle and application of unjust enrichment and the remedy of restitution in our local context.

[26] In a nutshell, the Federal Court in *Dream Property*'s case recognises that a plaintiff will be successful in its claim for unjust enrichment against a defendant if the plaintiff can prove that (i) the plaintiff has been enriched, (ii) that this enrichment was gained at the defendant's expense, (iii) that the plaintiff's enrichment at the defendant's expense was unjust, and (iv) whether there are any special defences to the claim. The remedy of restitution would naturally follow.

[27] Learned counsel for the respondents heavily relied on *Dream Property*'s case, arguing that it is sufficient for the respondents to prove all the elements above without electing to invalidate or set aside the SA or the SPA.

[28] However, with utmost respect, we are of the view that learned counsel for the respondents had misconstrued the principles in *Dream Property*'s case.

[29] In *Dream Property*'s case, the plaintiff brought an action against the defendant for breach of contract, which led to the termination of the contract and to recover vacant possession of the disputed land. At the time of filing the writ, the defendant had already begun construction works on the land to build the mall. Construction proceeded notwithstanding the court action and proceedings. By the time the trial was concluded, the construction of the mall was completed by the defendant and became fully operational. At the conclusion of the trial, the court found that the contract between the parties had been automatically terminated based on cl. 12 of the impugned contract. This was affirmed by the Court of Appeal and reaffirmed by the Federal Court.

[30] At the Federal Court, the issue of unjust enrichment and restitution was considered as a relief to the parties consequential to the contract being terminated. It is important to note that the Federal Court never disregarded the sanctity of the contract between the parties.

[31] We affirm our earlier view in *Kosbina Konsult (K) Sdn Bhd (In Liquidation) v. Madu Jaya Development Sdn Bhd* [2019] 6 CLJ 301; [2019] 3 MLJ 471 in which Her Ladyship Tengku Maimun JCA (now the Honourable Chief Justice) while expressing Her Ladyship's view on the principles enunciated in *Dream Property*'s case, held as follows:

> [35] As propounded by the Federal Court in *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453, the law of unjust enrichment is recognised by which justice is done in a range of factual circumstances and the restitutionary remedy is applied to attain justice. *Nonetheless we observed that in Dream Property, the law of unjust enrichment was articulated under the context of 'The Relief Questions'.* This is what the Federal Court said:
>
> > [93] So far *we* have dealt with the issue pertaining to the liability questions. *We conclude that the defendant only paid 10% deposit of the purchase price and failed to pay the balance of the purchase price even though obliged to do so under the SPA. As correctly decided by the High Court and the majority of the Court of Appeal, the plaintiff had, in our judgment, validly terminated the SPA.*
> >
> > [94] *This brings us to the relief questions.*

A The Relief Questions

Unjust Enrichment and Restitution

[95] To a large extent, *this issue deals with the restitution that the defendant claims it is entitled to, over and above the costs of construction of the mall, under the law of unjust enrichment.*

B [36] The decision of the Federal Court in *Dream Property* in our view is of no assistance to the respondent. *In Dream Property, the Federal Court did not move away or disregard the sanctity of contract between the parties as can be seen below:*

C [107] ... *The critical issue that needs to be addressed is what constitutes unjust enrichment and undue benefit, and in what manner should a purchaser of vacant land granted restitutionary relief when he has constructed a building on the said piece of land pursuant to and expressly permitted by a contract between him and the vendor.*

D [37] *We therefore agreed with the appellant that the learned judge erred in law in that His Lordship's decision is akin to allow the law of unjust enrichment to displace, defeat, override and/or undermine the clear terms of the subcontract between the appellant and the respondent.* (emphasis added)

[32] In *Kosbina Konsult*'s case, the appellant (Kosbina) was awarded a construction project by the Government. The carrying out of the project was E subcontracted to Maju Jaya Enterprise Sdn Bhd (MJE). Under the subcontract, MJE was entitled to 92% commission and Kosbina was entitled to the remaining 8%. However, the actual works were carried out by the respondent, which was owned by the same person who owned MJE. The Government terminated its contract with Kosbina, which resulted in the F subcontract also being terminated. Kosbina filed arbitration proceedings against the Government for wrongful termination and was awarded RM21.8 million. MJE sued Kosbina in the High Court for a 92% share of the arbitration award based on the sharing formula in the subcontract, but the suit was dismissed. Subsequently, the respondent filed a suit against Kosbina G for unjust enrichment, among others. The High Court decided that the respondent had carried out the works it was contracted to do and awarded RM8.3 million to the respondent, being half the arbitration award less certain payments that the respondent was not entitled to. The court also held that it was unconscionable for Kosbina to disregard the 92:8 sharing formula agreed under the subcontract. Kosbina appealed to the Court of Appeal.

H **[33]** On appeal, it was held, among others, that the respondent was not entitled under the law to claim for unjust enrichment independent of the subcontract for the reason that the law of restitution and unjust enrichment cannot be utilised to override, subvert or defeat the express terms of any I contract between the parties. In particular, Her Ladyship Tengku Maimun JCA (now the Honourable Chief Justice) held as follows:

[31] We wish to state at the outset that it seemed to us that *the respondent had taken a contradictory stand. The respondent on the one hand contended that the claim for unjust enrichment was made under common law and that there was no contract between the appellant and the respondent, but had on the other hand claimed for the proportionate share of the arbitration award under unjust enrichment.* This begs the question: what is the basis of the proportionate share? It must certainly be based on the subcontract. *The proportionate share came about only because of the agreement between the parties on the 92:8 formula.*

[32] The respondent's position that there was no contract was not tenable given the finding of the High Court in the first suit which was affirmed by this court and which had not escaped the learned judge's mind when he said: 'As stated though the Letter of Agreement was with MJE, for all practical purposes it is now read as referring to the Plaintiff as the Plaintiff was in effect the party carrying out the Works ...' *There was thus a subcontract between the appellant and the respondent which replaced the subcontract between the appellant and MJE.*

[33] *It was further submitted by the respondent that it was entitled under the law to claim for unjust enrichment independent of the subcontract.* In this regard the learned judge had relied on Goff & Jones, *The Law of Unjust Enrichment* (8th Ed, Sweet & Maxwell) and the English case of *Woolwich Building Society v. Inland Revenue Commissioners (No 2)* [1992] 3 All ER 737 to state, *inter alia*:

> ... By same token, even if a cause of action in contract has expired because of limitation having set in, it does not prevent a claimant from pursuing this claim in unjust enrichment if that cause of action is still subsisting.

[34] *With respect, we disagreed with the learned judge. Low Weng Tchung in his book The Law of Restitution and Unjust Enrichment in Malaysia* states the following with which we respectfully endorsed:

> [2.26] Contractual agreement to prevail. *While it is now beyond question that the law of restitution and unjust enrichment is separate and distinct category of the law of obligations, it must always be borne in mind that the law of restitution and unjust enrichment cannot be utilized so as to override, subvert or defeat the terms of any contract between the parties, especially where such contract has made express provision as to the allocation of risk between the parties.*
>
> [2.27] No redistribution of risk allocation by contract. Generally speaking, *in the absence of any vitiating factors such as fraud, duress or misrepresentation resulting in any agreement being avoided ab initio, and where the agreement has not been frustrated due to impossibility of performance, the agreement between the parties should not be disturbed, and the courts should not invoke the law or restitution and unjust enrichment to redistribute risks which have been allocated by the mutual agreement of the parties.* (emphasis added)

[34] In fact, when dealing with the issue of whether the enrichment was unjust, the Federal Court in *Dream Property*'s case, with reference to Goff & Jones on *The Law of Unjust Enrichment*, held as follows:

> [128] The most important question which we must now asked is *whether it is unjust for the plaintiff to retain to the benefit* (the unjust question). The English approach to the unjust question is *to ascertain an unjust factor such as, for example, mistake or failure of consideration.* This differs with the civilian approach to the unjust question which consider whether there is a lack of juristic basis. Goff & Jones on *The Law of Unjust Enrichment*, para 1-11, explained these two approaches as follows:
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> > Many civilian and mixed law systems have a law of unjustified enrichment, under which a claimant will be entitled to restitution *if he can show that a defendant was enriched at his expense and that there was no legal ground for the defendant's enrichment.* Under these *systems a defendant can escape restitutionary liability by showing that there was a legal ground for his enrichment,* for example because the *claimant was required to benefit the defendant* by statute or *by contract.* The reason why there is no liability in these circumstances is that *the defendant's enrichment is not unjustified and so the claimant has no prima facie right to restitution.*
> >
> > The English law of unjust enrichment frequently produces the same results as the law of civilian and mixed law systems, but it works in a different way. Under English law; a claimant will be entitled to restitution if he can show that a defendant was enriched at his expense, and that the circumstances are such that the law regards this enrichment as unjust. *For example, a claimant will have a prima facie right to restitution where he has transferred a benefit to a defendant by mistake, under duress, or on a basis that fails.* Nevertheless, the defendant can escape liability if another legal rule entitles him to keep the benefit, and this rule overrides the rule generated by the law of unjust enrichment which entitles the overrides the rule generated by the law of unjust enrichment which entitles the defendant to restitution. *For example, a claimant may have paid money to a defendant by mistake, but even so, the payment may be irrecoverable if the claimant was required to pay the money by a statute or by a contract previously entered by the parties.* Although the claimant would otherwise have a claim in unjust enrichment, *the defendant's enrichment is justified by the statute or contract.* (emphasis added)

[35] Turning to the facts of the present case, we found that the respondents did not seek to set aside the SA and the SPA in their claim against the appellant. This was undisputed. In the absence of so doing, the respondents cannot seek restitution for unjust enrichment, following *Kosbina Konsult*'s case. The respondents are, therefore, bound by their contractual bargain under the SA and the SPA, especially on the agreed purchase price of the said

land. The respondents cannot now claim that the appellant has been unjustly enriched through the arrangements that the respondents themselves have agreed to, as this would be equivalent to allowing the respondents to override, subvert or defeat the terms of the SA and the SPA.

[36] We find that there is merit in this issue. We hold that there is a serious misdirection in law by the learned trial judge in not taking into consideration the above issue, which warrants our appellate intervention.

Second Issue: Coercion

[37] It was submitted by learned counsel for the appellant that the learned trial judge had erred in three material aspects of the respondents' claim for coercion as follows:

(i) the learned trial judge did not apply the correct provisions in the Contracts Act to determine the issue of coercion;

(ii) the learned trial judge did not consider that there can be no coercion when a party seeks to enforce its legal rights; and

(iii) there was insufficient judicial appreciation of the evidence in relation to the claim for coercion.

[38] First and foremost, s. 10(1) of the Contracts Act states that:

> Section 10. What agreements are contracts.
>
> (1) **All agreements are contracts** if they are **made by** the **free consent** of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void. (emphasis added)

[39] Section 14 of the Contracts Act defines the term 'free consent' as follows:

> Consent is said to be free **when it is not caused by** -
>
> (a) **coercion, as defined in section 15;**
>
> (b) undue influence, as defined in section 16;
>
> (c) fraud, as defined in section 17;
>
> (d) misrepresentation, as defined in section 18; or
>
> (e) mistake, subject to sections 21, 22 and 23.
>
> **Consent is said to be so caused when it would not have been given but for the existence of such coercion,** undue influence, fraud, misrepresentation, or mistake. (emphasis added)

[40] Section 19(1) of the Contracts Act states that a contract is voidable when consent to an agreement is caused by coercion, among others, at the option of the party whose consent was so caused.

[41] Section 15 of the Contracts Act defines 'coercion' as:

> "Coercion" is the *committing, or threatening to commit* any *act forbidden by the Penal Code,* or the *unlawful detaining or threatening to detain, any property, to the prejudice of any person* whatever, *with the intention of causing any person to enter into an agreement.* (emphasis added)

[42] In the present case, the nature of the respondents' claim was that they had agreed to the purchase price of the said land in the SA and the SPA through the appellant's alleged coercion, even though the value of the said land was higher. Therefore, we are of the considered view that in order for the respondents to be successful in their claim, the elements in s. 15 of the Contracts Act above must be fulfilled.

[43] This the respondents failed to do. The respondents, on the other hand, had brought their claim against the appellant under s. 73 of the Contracts Act for coercion and restitution. For the sake of completeness, the relevant provision reads:

> Section 73. Liability of person to whom money is paid, or delivered, by mistake or under coercion.
>
> A person to whom **money has been paid, or anything delivered,** by mistake or **under coercion, must repay or return it.** (emphasis added)

[44] Illustration (b) to s. 73 of the Contracts Act clearly states the application of this provision, as can be seen below:

> (b) A railway company **refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge** for carriage. The consignee pays the sum charged in order to obtain the goods. **He is entitled to recover so much of the charge as was illegally excessive.** (emphasis added)

[45] The term 'coercion' under s. 73 of the Contracts Act is interpreted in its general and ordinary sense and not subject to the strict statutory definition under s. 15 of the Contracts Act.

[46] The reasons were aptly stated by Eusoff Chin J (as he then was) in *Chin Nam Bee Development Sdn Bhd v. Tai Kim Choo & Ors* [1988] 1 CLJ 319; [1988] 1 CLJ (Rep) 457; [1988] 2 MLJ 117 by citing the Privy Council's decision in *Kanhaya Lai v. National Bank Of India Ltd* [1913] ILR Vol XL (Calcutta series) 598 as can be seen below:

> The Privy Council in *Kanhaya Lai v. National Bank of India Ltd* 1913 ILR Vol XL (Calcutta series) 598 held that the meaning of the word "coercion" as defined under section 15 of the Indian Contract Act (Act IX of 1872) should be confined to the interpretation of the word "coercion" as found under section 14 of the Indian Act, and that the words "coercion" as found in section 12 of the Indian Contract Act should be given its ordinary meaning. Lord Moulton, delivering the judgment of the Privy Council, at pp. 611 to 613 said:

The main contention, however, was that the allegations in the plaint did not show 'coercion' according to Indian law. It was contended that nothing could be 'coercion' under Indian law unless it satisfied the definition of 'coercion' which is found in section 15 of the Indian Contract Act and that the allegations in the plaint failed so to do because they did not show that the 'unlawful detaining or threatening to detain' the property was 'with the intention of causing any person to enter into an agreement'. Their Lordships are of opinion that this argument is not sound and that it is based on a fundamental misunderstanding of the object and effect of section 15 of the Indian Contract Act.

Section 15 forms part of a chapter which specially deals with the requisites of a valid contract. This chapter commences with section 10, which may be regarded as the fundamental section, and which reads as follows:

> All agreements are contracts if they are made by the free consent of parties competent to contract for a lawful consideration and with a lawful object and are not hereby expressly declared to be void.

The sections immediately following proceed to define the terms used in this fundamental section. Sections 11 and 12 are devoted to the interpretation of the phrase 'competent to contract'. Section 13 deals with the term 'consent'. Sections 14 to 18 deal with the phrase 'free consent'. In so doing section 14 commences by defining when consent is said to be 'free' and lays down, that it is so when it is not caused by 'coercion' as defined by section 15, 'or undue influence, fraud,' *etc*. It will therefore be seen that section 14 relates to 'free consent' as an element in the making of contracts. It is natural, therefore, that when 'coercion' comes to be defined in section 15 for the purposes of section 14 it is defined as follows:

> 'Coercion' is the committing or threatening to commit any act forbidden by the Indian Penal Code or the unlawful detaining or threatening to detain any property to the prejudice of any person whatever with the intention of causing any person to enter into an agreement.

It is clear, therefore, that this definition of 'coercion' is solely a definition which applies to the consideration whether there has been 'free consent' to an agreement so as to render it a contract under section 10. This explains why in the definition of 'coercion' it is limited to an unlawful act done 'with the intention of causing the person to enter into an agreement'. *But it would be to make nonsense to the statute if it were to be taken to mean that 'coercion' in a legal sense could only exist if the object was to bring about a contract.* Indeed such an interpretation would render the Act inconsistent with itself. Section 72, which is in Chapter 5, which deals with 'Certain Relations Resembling Those Created By Contract', reads as follows:

A person to whom money has been paid or anything delivered by mistake or under coercion must repay or return it.

and Illustration B to that section reads as follows:

A railway company refuses to deliver up certain goods to the consignee except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

It is impossible to contend that the coercion referred to in this section or in the above Illustration is 'with the intention of causing any person to enter into an agreement'. The word 'coercion' must therefore be there used in its general and ordinary sense as an English word, and its meaning is not controlled by the definition in section 15. That definition is expressly inserted for the special object of applying to section 14 *ie*, to define what is the criterion whether an agreement was made by means of a consent extorted by 'coercion' and does not control the interpretation of 'coercion' when the word is used in other surroundings.

Having read and compared sections 10, 14, 15 and 72 of the Indian Contract Act, *I found them to be in pari materia with sections 10, 14, 15 and 73 of our Contracts Act 1950.*

Since I have found no good or sufficient cause to upset the findings of facts by the magistrate that *the plaintiffs/respondents in this case had paid the extra $4,000 to the defendants/appellants without consideration, but paid under threat by the appellants to cancel their bookings for their houses, the amount paid by the plaintiffs must be refunded* to them under Section 73 of the Contracts Act 1950. (emphasis added)

[47] We also approve the view of Low Hop Bing J (as he then was) in *Lee Fu Sdn Bhd v. Unique Progress Sdn Bhd* [2003] 4 CLJ 171 that s. 73 of the Contracts Act is applicable to an action based on *quasi*-contract or restitution, which is separate and distinct from the nature, quality and substance of the transactions between the plaintiff and the defendant. The following is observed:

In my view; *s. 73 is the statutory formulation of an action for money had and received which is based on quasi contract or restitution:* see Pollock & Mulla, on *Indian Contract And Specific Relief Acts* 10th edn, p. 598. *That is a different cause of action which is separate and distinct from the nature, quality and substance of the transactions between* the plaintiff and the defendant *viz.* for goods sold and delivered. (emphasis added)

[48] By way of comparison, s. 71 of the Contracts Act is also categorised under Part VI of the Contracts Act and this court earlier held that s. 71 of the Contracts Act has no application in the face of clear contractual provisions.

[49] In *Pembinaan SPK Sdn Bhd v. Jalinan Waja Sdn Bhd* [2016] 10 CLJ 112, Mohamad Ariff Yusof JCA (as he then was) while delivering the majority judgment of this court, held as follows: A

> [28] *There was likewise no basis for s. 71 to be applied, especially in the face of clear contractual provisions* which made the appointment of the respondent as process designer dependent on further agreement during the post-award stage. *Section 71 cannot be interpreted as providing a relief not intended by the parties.* To quote this provision for the sake of completeness: Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered. B C
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> [29] *As for the argument on implied term, to accept it would mean conflicting directly with the clear terms of cl. 10. As observed earlier, it is no function of the courts to improve the case for the contracting parties. If the result seems unfair to the respondent, the short answer to this shortcoming must be this: It is for a party such as the respondent to ensure by clear contractual provisions that its pre-award expenses and costs should be reimbursed or shared in whatever proportion it might think fair in the circumstances.* It made a commercial decision by choice to agree to cl. 10 and cl. 2.1 in the co-operation agreement. *It has to stand by it based on the principle of freedom of contract which is a foundation of our contract law.* (emphasis added) D E

[50] Based on all of the above, we are of the view that based on the nature of the respondents' claim against the appellant, there was a misdirection on the part of the learned trial judge when Her Ladyship found that the respondents had successfully proven coercion on the part of the appellant with reference to s. 73 of the Contracts Act. F

[51] On our part, we find that the respondents had failed to adduce compelling evidence that the SA and the SPA were made under coercion, as pleaded by the respondents and defined in s. 15 of the Contracts Act. We also find that the respondents are disentitled to rely on s. 73 of the Contracts Act. G

[52] Next, we are also of the view that the evidence adduced discloses that the SA and the SPA were entered by the parties of their own free will without criminal intimidation.

[53] In our mind, there is nothing illegal with what DW2 said in a meeting between the parties during the negotiation stage that all the buses will be returned to the respondents so long as all the agreements are signed. There is nothing illegal in the appellant's demand for the outstanding payment due and owing to the appellant, in which the appellant would commence winding-up proceeding against the respondents if they did not amicably resolve the payment problem. In our view, there can be no coercion when H I

a party is making known its intention to seek to enforce its legal rights (see *Teck Guan Trading Sdn Bhd v. Hydrotek Engineering (S) Sdn Bhd & Ors* [1996] 1 BLJ 163; [1996] 4 MLJ 331).

[54] In any case, we also find that the respondents had willingly agreed to transfer the said land without prior ascertainment of the value of the said land at the material time. There was a series of meetings and correspondences between the parties during a period of three months, from April to June 2016, to negotiate the terms of the SA and the SPA. In other words, the respondents must have found it reasonable to settle on that basis as they did. We reiterate that is not the duty of this court to improve the contract for the parties, especially on the agreed express terms in the contract.

[55] In a nutshell, we found merits in this issue raised by the appellant. We found that there is a serious misdirection on the part of the learned trial judge which warrants our appellate interference.

Conclusion

[56] In conclusion, based on all of the above, we find that appellate intervention is justified. The appeal is allowed, and the decision of the High Court dated 15 July 2021 is set aside with costs of RM120,000 here and below, subject to allocatur.